

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

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FILE: B-183540

DATE: October 9, 1975

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MATTER OF: Bayshore Systems Corporation

DIGEST:

1. Protest against cancellation before bid opening of solicitation for design and development of low cost sound level meters is without merit where agency discovers that meters are already developed and readily available. However, agency was remiss in issuing instant solicitation and is advised to take steps to prevent recurrence of situation.
2. Claim for bid preparation costs allegedly incurred by prospective bidder based on improper issuance of solicitation is denied where it does not appear that agency acted in bad faith and it is not possible to conclude that claimant would have been entitled to award since solicitation was cancelled before bid opening.

Bayshore Systems Corporation (Bayshore) has protested against the postponement of the bid opening for and subsequent cancellation of invitation for bid (IFB) No. WA75-E-092, issued by the Environmental Protection Agency (EPA) on February 3, 1975. Basically, Bayshore contends that the postponement was arbitrary, untimely, and caused by improper exchanges of information between EPA and a potential bidder and such information was not made available to all potential bidders. Bayshore asserts that this postponement together with what it considers was an improper and untimely cancellation of the procurement should entitle it to reimbursement for its bid preparation costs.

This procurement called for the fabrication and testing of low cost sound level meters and sound level meter kits. Bid opening was scheduled for 3:30 p.m. on March 10, 1975. Due to questions raised by several bidders, a decision was made at 1:00 p.m. on the afternoon set for bid opening to postpone the opening and, according to the agency, all solicited companies had been so notified by telephone by 2:45 p.m. A confirming amendment was also issued that day. Bayshore, however, had already sent a representative to deliver its hand-carried bid and he arrived at the agency at approximately 2:30 p.m. and was notified of the postponement.

In this connection, EPA states that numerous questions had been raised by potential bidders and "*** it was obvious that additional information would have to be included in the Invitation ***." The result was the postponement of bid opening and the issuance of Amendment No. 1 to the invitation on March 10, 1975, which attempted to more clearly explain the contractor's liability for defective items.

Bayshore contends that the postponement of bid opening was improper in that, it was caused by "exchanges of information between a specific potential bidder and the EPA and that the results of these contacts are not being made available to all potential bidders." EPA denies the allegation, pointing out that the only information obtained from a potential bidder was conveyed to all potential bidders by Amendment No. 1. Without any probative evidence to the contrary, we would not be justified in assuming some improper conduct on the part of EPA.

Thereafter, bid opening was rescheduled for 3:30 p.m. April 15, 1975. Bayshore sent a representative to attend the opening, but upon arrival the representative was informed that the procurement had been canceled.

The record shows that EPA decided to cancel the solicitation because it discovered that the procurement was not needed. The purpose of the procurement was to develop a low cost sound level meter so that such meters would be available to the Government. However, on April 14, 1975, the contracting officer was advised by the project officer that the meters were already available both on the General Services Administration's Federal Supply Schedule (FSS) and in the open market as had been indicated previously by some of the potential bidders for this procurement.

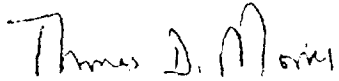
While Bayshore contends that the cancellation of the solicitation was arbitrary and capricious because opening of the bids would have revealed that its price for the meter was lower than the FSS item, we find no basis to conclude that cancellation of the procurement was improper once it was discovered that development of a low cost meter was not required. On the other hand, we believe that the agency was remiss in initiating the procurement without an adequate basis therefor. By letter of today we are recommending to the Administrator of EPA that steps be taken to prevent the recurrence of this type of situation in the future.

Finally, Bayshore has requested reimbursement for its bid preparation costs. In a series of cases beginning with Heyer Products Company v. United States, 140 F. Supp. 409; 135 Ct. Cl. 63, the Federal courts have recognized that because bidders and offerors are entitled to have their bids and proposals considered fairly and honestly for award, the preparation costs of a bid or proposal which was not so considered may be recoverable in certain circumstances. Heyer held that recovery could be had only where clear and convincing proof showed a fraudulent inducement of bids, that is, that bids were not invited in good faith, but as a pretense to conceal the purpose to award the contract to some favored bidder or bidders, and with the intent to willfully, capriciously, and arbitrarily disregard the obligation to let the contract to the bidder whose bid was most advantageous to the Government. 140 F. Supp., supra, at 414.

Subsequently, the courts have modified the standard set forth in Heyer in order to allow recovery of bid preparation costs in the situation where the Government's evaluation of bids has been so arbitrary or capricious as to preclude a particular bidder from an award to which it was otherwise entitled. McCarty Corporation v. United States, 499 F. 2d 633, (Ct. Cl. 1974); Armstrong & Armstrong, Inc. v. United States 356 F. Supp. 514 (1973); see T. & H. Company, 54 Comp. Gen. (1975), 75-1 CPD 345.

However, as our Office held in Keco Industries, Inc., 54 Comp. Gen. 215 (1974), 74-2 CPD 175 and Federal Leasing Inc., DPF Inc., 54 Comp. Gen. 872 (1975), 75-1 CPD 236, the courts have not indicated that we should deviate from the higher standard of the Heyer decision when, as here, a claim for bid preparation costs is being considered based on the improper issuance of a solicitation.

Using the Heyer standard, we are unable to conclude that the EPA acted in bad faith in issuing the instant solicitation. Moreover, it should be noted that the solicitation was canceled before bid opening. Therefore, it is not possible to conclude that the protester would have been entitled to an award had the procurement been allowed to proceed. Under the circumstances, Bayshore's claim for bid preparation costs is denied.


 Acting Comptroller General
 of the United States